Mediation:

A concept that has to do not just with the justice system

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Abstract

Conflicts and disputes among people are an integral part of everyday life, of our private and professional life. They can be of any kind, from social, commercial, family related disputes up to those between the states themselves. Just as the types and natures of disputes increase with the economic and cultural development of any society, the mechanisms of dealing with them take a special importance as well. Besides dispute resolution by state bodies that are established by law, alternative ways for resolving disputes are developing increasingly and are receiving a special importance as well.

The alternative solution of a dispute is nothing more than an alternative for resolving the dispute outside the judicial system, where the main ways are mediation and arbitration. Alternative solutions to disputes are widespread in countries of common law systems, considering that most disputes are solved in this way. In this article we will examine mediation and its development especially in Albania. Mediation is a way to resolve disputes between two or more parties, where a third person, the mediator, negotiates with the parties so that they arrive at a solution acceptable to all.

Keywords: mediation, dispute, reconciliation, court, mitigation

Introduction

Regardless of all the development that mediation has taken in recent years, as a concept and a means used to resolve disputes, it dates back to ancient times. The practice of mediation was developed in ancient Greek times, where the mediator was known as *proxenetas* and later on in the Roman civilization. The Code of Justinian recognized and accepted mediation also. The role of mediation as a separate institute undertook a huge momentum, especially in the twentieth century, parallel to the economic development. The development of capitalism and industrialization brings the need for a fast and efficient solution of conflicts and disputes, which is performed quite well by mediation.

With all the changes that the activity of mediation may go through in different countries, the basic principles[1] on which this activity is established and functions are as follows:

- *Conflict of interest* – each mediator should avoid participation in a case where there is a direct personal, professional or financial interest in the resolution of the dispute.
- *Professional restriction* - in the sense that every mediator must recognize the limits of their professional skills and should not take over negotiations on issues on which they lack experience and knowledge.
- *Impartiality* - in order to reach an agreement during the mediation process, it is important for the mediator to maintain impartiality and ensure both parties on his/her objectivity.
- *Volunteering* - Participation in the mediation process, as well as reaching an agreement should be the product of free will of the participating parties. In addition, parties are free to withdraw from a mediation process, if they think that the dispute will not be resolved in this way.
- *Confidentiality* - the entire mediation process is established and operates based on confidentiality. The mediator must preserve the privacy of the process and the parties, against any third parties who are not part of it.
- *Legitimacy* - means that the process of mediation, if in any case, it ends with an agreement, the latter must not be contrary to the law.

A short view of mediation in Albania.

In different historical periods in Albania, mediation of disputes is performed by assemblies, presbyteries, aldermen and reconciliation commissions to blood feuds, up to organizations and foundations having as an objective the settlement of disputes.

Assemblies have been part of the organization of institutes of investigation and trial, known and regulated by the Canon that has operated in Albania. A special place in the work of assemblies, constituted forgiveness and reconciliation, which were reached through mediation and mediators and it was evaluated as an expression of magnanimity and manhood. *Presbyteries* were a different type of organization that according to canon, had as a task conflict resolution. By canon, it is clear that the role of elders has been of particular importance, especially due to the fact that they were selected with great care, by assessing first their impartiality. The village presbyteries can be found also in the period of King Zog[2], where it was declared that *"Presbytery reconciles disagreements arising between the villages"*, making clear the role of the mediator and of the arbitrator.

[1] http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CDYQFjAA&url=http%3A%2F%2Fwww.iamed.org%2Fpdf%2FTen%2520Principles%2520of%2520Mediation%

http://www.posredovanje.me/en/mediation/basic-principles-of-mediation.html

[2] Law no.83, dated 23.05.1928 "On the civil administration of the Albanian Kingdom"

During the communist dictatorship, *social courts*[3] were considered as part of the judicial system, even though their jurisdiction included only a very limited category of issues that could be considered by them. The mediator features that these courts possessed were observed in the competence they had to make all possible efforts to reconcile the parties. *Blood feuds reconciliation commissions* have operated at different times and even today, they continue to play an important role in the termination and settlement of conflicts, by undertaking the difficult mission to prevent incarceration of families because of blood feud. The social organizations that were created during the communist period, such as the front, youth, women organization, etc.., aimed among other things the review of disputes that may arise between their members, or between them with others. These organizations were given a great power, enabling them to intervene in the private aspects of life, by overcoming explicitly the mere role of negotiator.

Reconciliation offices are bodies established to resolve disputes related to labor relations. Under the current Labor Code, the offices of reconciliation are the bodies responsible for resolving disputes between employers and representatives of the employees, such as unions. The reconciliation procedure is free of charge and it is regulated by a Council of Ministers' Decision.

The Mediation Center was established in 2002 and it was supported by a World Bank project, with the aim of establishing a specialized center for resolving disputes. This center is focused on the practice of common law countries, considering that these countries already have quite a significant mediation practice. Besides the center concerned, several foundations were created in Albania which among other things, perform activities related to mediation of disputes, by avoiding the parties from facing trial.

Despite sporadic legal developments, until the year 1999 a specific law on mediation and the establishment of this important institute was lacking. Law no. 8465, dated 11.03.1999 "On mediation to dispute resolution" marks the first legislative attempt to regulate this area. This law's main goal was to educate the parties in a dispute, propagate the social effect that brings the resolution of a dispute without being brought to court and, as such, cases that were subject to mediation were very limited. Areas where mediation was implemented were mainly related to family disputes, marital and parental obligations, civil disputes concerning the infringement of property rights, as well as in caused damage. Thus, this regulation aimed mainly at regulating non-property disputes. Mediation was provisioned as a social activity, independent, voluntary, of confidential nature and without compensation. In the case of possible expenses, they would be divided equally between the parties.

[3] Law no.4406, dated 24.06.1968 "On the organization of the judicial system"

Law no. 9090, dated 26.06.2003 "On mediation in dispute resolution" constitutes a very important step for strengthening the institution of mediation and regulating it legally. This law was an effort to correct the shortcomings of the previous law, but also to expand the scope of mediation, based on the experience from the previous law. One of the significant changes compared with the previous law is also the provision on the possibility of compensation for those mediators who practice this activity as a profession.

Law no. 9090, by the nature of the activity of mediation, as an activity outside of the field of the judiciary, gives priority to the will of the parties, not only to choose the alternative of mediation as a way to resolve disputes between them, but also to determine the mediation procedure. Therefore, the parties are free to determine under which proceedings they wish to reach a reconciliation agreement between them. The provisions of the law no. 9090 related to the mediation procedure, in reality are limited only in anticipating cases, when there is no agreement between parties concerning the mediation process, as well as in clarifying some procedural aspects, which are essential to ensure that this activity is conducted in accordance with its legal function.

The current regulation of mediation, law no. 10 385 dated 24.02.2011

Despite the obvious improvements to the law of 2003, it remained a law that was not applicable in practise. This law also failed to meet all EU requirements, because it was not in line with the acquis. In this framework, given the international obligations that Albania had taken in the stabilization and association process and on the continuous requests from foreign experts, as well as from civil society, a new law was drafted, no. 10385, dated 24.02.2011 "On mediation in dispute resolution", which abolished the law of 2003.

One of the main differences from the previous law is the way of organizing the mediation activity. The person, who will play the role of the mediator, should be registered in the Licensing Commission of Mediators. The law provides that the mediation activity shall be conducted under the auspices of the Ministry of Justice. Another difference to the law of 2003 is that of providing all the procedure for establishing the Licensing Commission of Mediators, the way for obtaining the license, the registration of the person who performs such an activity, etc.

The mediator exercises his/her activity as a natural or legal person through his office or centre, after being licensed and registered in the Register of Mediators. Under the mediation agreement signed by the parties, those mediators who practice this activity as a profession, have the right to request and be rewarded for the work, as well as for the expenses incurred in the mediation procedure.

The Licensing Commission of Mediators is established under the Ministry of Justice and is composed of two representatives from the National Chamber of Mediation and three representatives from the Ministry of Justice. The scope of mediation was extended by including the resolution of all disputes in the field of civil, commercial, labour and family law. Mediation may be initiated by the parties, one or both parties, may require initiation, under their free will, or by reference from the court. The court or the relevant state body, when put in motion to resolve a dispute in the field of civil, commercial, labour or family law, within the powers provided by law, invites the parties to resolve through mediation, particularly, but not only limited to them, disputes of:

- civil and family matters, when interests of minors are concerned;
- matters of reconciliation for cases of divorce, as provided by Article no. 134 of the Family Code;
- a wealth character, with an object of compliant up to 500 thousand lek, as well as for claims to research the object, for denial of claims/claims of denial and for claims on terminating the violation of possession.

According to articles 59 and 284 of the Code of Criminal Procedure, and in any other case where the special law allows for it, mediation in criminal matters shall also apply to disputes that are reviewed by the court at the request of the injured accuser, or by complaint of the injured. In these cases of disputes in the criminal field, where the criminal proceeding has begun, the court is obliged to invite the parties for resolving the dispute through mediation. If at the conclusion of the mediation process the parties agree to resolve the dispute, they sign an agreement together with the mediator. The agreement is binding and enforceable in the same degree of an arbitration decisions[4].

In order to improve the legislation of mediation but also its implementation in practice, USAID in cooperation with the International Finance Corporation (IFC), in 2009, developed the project for the recognition and presentation of mediation by the courts. Mediation linked to courts, was experimented by the IFC in Durres District Court and was supported by the Ministry of Justice and the High Council of Justice. The main objective of this pilot project was to introduce and implement the practice of mediation, as part of the judicial system and to establish a model which can be widely applied throughout the justice system. Among the pilot project activities, was the opening of an office of mediation within the Court, in cooperation with the Albanian Foundation for Conflict Resolution and Reconciliation of Disputes, equipped with administrative logistics: selection and training of a group of 10 mediators and organizing seminars for judges and lawyers in relation to the identification and referral of cases.

[4] Articles 432-433 of the Code of Civil Procedure

At the conclusion of this project, about 80 cases were counted in the Durres District Court, which were referred by Judges and were resolved by this center within a period of 18 months, freeing up about $ 8 million in cash or frozen assets.

Mediation, pros and cons

As stated above, mediation is one of the alternative ways of resolving disputes, which is continuously taking an even more important role. This is connected to the fact that mediation is considered as a more easy and effective way to resolve disputes in a variety of areas. However, in addition to a number of reasons why mediation is effective and should take a wider scope, there are also some disadvantages to it, which lead to some reservations on this process. In Albania, although mediation is a new procedure, that does not have a solid and highly developed practice, as perceived in other countries, we can summarize as follows the reasons pro and against it.

Pros:

- *Cost and Time* - Even though the mediator applies a fee for carrying out the mediation, the mediation process as a whole appears to have a cost several times lower than judicial proceedings. Mitigation is usually developed within a very short time, several hours to several days, where the parties themselves and the mediator are the ones who choose the time period within which they want to complete this process. Judicial disputes take up to a few years before a final decision is taken, which translates into financial cost for the parties. Thus, mediation is a good choice considering the cost and time required to resolve the dispute.
- *Audit* – The completion of the process depends on the parties themselves, as they are those who decide whether an agreement is reached and how it will be reached. Unlike court decisions, which often are in favor of one party and against another, in the case of mediation the parties can reach an agreement that is acceptable to all, thus we are dealing with a win-win situation where one party does not impose to the other party an agreement on its drawback, but reach a point where their interests coincide.
- *Confidentiality* - One of the basic principles of mediation is confidentiality. While the judicial proceedings are open to the public and exposed to the media also, a mediation process remains confidential where only the mediator and the parties are aware of its development and of the data that are presented during this process.
- *The right to terminate the process and to address the court* - If during the mediation process it is noticed that the process is not going on the right way to reach an agreement, or if they think that the proposed deal does not protect their interests, each of the parties is entitled the right to withdraw from the mediation process and address the court to resolve the dispute.

- *Reduce social tension* – Even though there is a dispute between the parties, which can often be at the boundaries of a conflict, sitting the parties around a table with the aim of finding a solution acceptable to both parties, brings up the need to communicate and find a solution as positive as possible. Thus, along with the resolution of the dispute comes also the mitigation of a conflict, since the parties have reached that conclusion with their free will, believing that it is the best choice for them.

Cons:

- *The lack of knowledge and distrust* – Just as we mentioned above, although mediation has had a historical development in Albania, it still remains a new field and without any developed practice. In addition, even the complete legal regulation of this field, in compliance to the European standards, was achieved only 1 year ago. In these conditions, the knowledge that the public has on mediation as an alternative option which they can turn to, in order to resolve their differences, is limited. The lack of knowledge is accompanied with the distrust that mediation might work in practice, given that in a society often with chaotic developments, the justice in many cases is difficult to be put in place by the courts, and thus even more difficult by mediation.
- *The role of the mediator* - Despite the goodwill of the parties, the quality of a mediation agreement depends in large part on the mediator and his professional skills. The mediator, in accordance with the law should be trained with specific skills, however it may be that the lack of experience or good knowledge on a certain field, might not guide the parties towards the right way, considering also that the mediator is the drafter of the reached agreement.
- *May result in financial and timely costs* - As mentioned above, if during a mediation procedure parties feel that it is not in the right way, they can disrupt the process to address the court. Regardless of the conclusion of a mediation procedure, the cost for the payment of the mediator is irreversible.

Conclusions

Mediation in Albania may be considered a new field without much experience. Until recently, the courts and the public lacked both, the legal framework in line with the European standards, as well as a good knowledge on this process. However, the experience of the court of Durres brought an innovation on the Albanian mentality and in the justice system. The practice of mediation has low costs for the state and the parties, and it also brings very positive results.

Mediation is not just a concept that has to do with the justice system. Mediation in a conflict, it is also considered a democratic process, because it contains within itself;

dialogue, compromise, consensus, tolerance and reconciliation. On the other hand, to mediate means to influence positively in a conflict. But it means to serve to the system also, save money, time and remove a workload from institutions by returning the conflict to the parties that are part of it and not to third parties.

Mediation is a reality also in Albania and it has a legal framework of European standards. The economic development, but also obtaining knowledge on the functioning and the advantages of mediation, will enable more and more parties in a conflict to apply the mediation procedure for resolving disputes.

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